28663 SERVICE DATE - JULY 12, 2000
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SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41843

MASTER LOCK COMPANY
v.
BE-MAC TRANSPORT COMPANY, INC.
AND THE PLAN COMMITTEE
FOR BE-MAC TRANSPORT COMPANY, INC.

Decided: July 6, 2000

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 13711. Because of our finding under section 13711, we will not reach the other issues raised in this proceeding.

BACKGROUND

This complaint arises out of a court action in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, in Be-Mac Transport Company, Inc. and the Plan Committee for Be-Mac Transport Company, Inc. v. Master Lock Company, Adv. No. 95-4509-293. The court proceeding was instituted by Be-Mac Transport Company, Inc., and the Plan Committee for Be-Mac Transport Company, Inc. (Be-Mac or defendant),[1] a former motor common and contract carrier, to collect undercharges from Master Lock Company (Master Lock or complainant). Be-Mac seeks undercharges of $116,403.32 (plus interest), allegedly due, in addition to amounts previously paid, for services rendered in transporting 999 shipments of locks, lock sets, and related products between May 12, 1992, and December 22, 1992. The shipments moved from Master Lock's facility at Milwaukee, WI, to points in Tennessee, Illinois, Missouri, Iowa, Kentucky, Kansas, Nebraska, South Dakota, and Mississippi. By order dated May 20, 1996, the court directed complainant to initiate administrative proceedings before the Board for determination of the applicable issues raised and administratively closed the proceeding.[2]

[1] On January 22, 1993, Be-Mac filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, Case No. 93-40022-293.

[2] The Court retained exclusive jurisdiction over the proceeding and authorized reopening upon the request of either party.

Pursuant to the court order, Master Lock, by complaint filed June 26, 1996, requested the Board to resolve issues of unreasonable practice and rate reasonableness as well as any other relevant issues within its primary jurisdiction. By decision served August 14, 1996, the Board issued a procedural schedule. On November 4, 1996, complainant filed its opening statement. Defendant filed its statement of facts and argument on November 14, 1996, and Master Lock submitted its rebuttal on December 24, 1996.

Complainant asserts that defendant's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711(a) and that the rates defendant now seeks to collect are unreasonable. Master Lock states that the freight bills originally issued by Be-Mac were paid in full in a timely fashion and that the payments made were accepted by Be-Mac without objection. Complainant suggests that the originally assessed charges were based on commodity rates negotiated with Middlewest Freightways, Inc. (Middlewest), that were published in a discount tariff issued for its account by Middlewest. Master Lock maintains that Middlewest was acquired by Be-Mac, apparently in 1992; that Be-Mac was a participant in the Middlewest tariff (Tariff ICC MFIC 457); and that it relied upon the published agreed-to rates in tendering its traffic to Be-Mac. Included as part of complainant's evidentiary submission are copies of the rerated freight bills issued on behalf of defendant that contain originally issued freight bill data as well as "corrected" balance due amounts. An examination of these freight bills indicates newly assessed charges based on undiscounted class rates substantially higher than the amounts originally billed.

Master Lock supports its argument with an affidavit from Kirk D. Klefstad, Transportation Analyst for complainant responsible for ensuring that Master Lock did not incur excessive transportation costs. Mr. Klefstad states that Master Lock negotiated specific commodity rates with Middlewest that were comparable to rates offered by other carriers in 1992.[3] Mr. Klefstad asserts that Be-Mac was a participant in Middlewest Tariff ICC MFIC 457-E[4] and that Be-Mac, following its takeover of Middlewest, advised complainant that it would continue to charge the same rates previously assessed by Middlewest. Mr. Klefstad maintains that Be-Mac agreed to the rates set forth in the Middlewest tariff, knew that Master Lock relied on those negotiated rates when tendering its traffic to defendant, and honored the agreed-to negotiated rates by billing and collecting them after adding its name to the tariff in which they were originally published. He asserts that in 1992 numerous other motor carriers provided

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[3] Attached as Appendix B to Mr. Klefstad's affidavit is a letter dated October 21, 1991, from Middlewest to Master Lock, referring to their negotiations and to the offered rates and terms of service. According to Mr. Klefstad, the negotiated commodity rates reflect the equivalent of an approximately 50% discount off class rates.

[4] Supplement 2 to tariff ICC MFIC 457-E, effective April 20, 1992, attached as Appendix C to Mr. Klefstad's affidavit, identifies Be-Mac as a participant in the Middlewest tariff.

complainant with service at rates comparable to those originally assessed by Be-Mac. Mr. Klefstad states that, had defendant attempted to bill at the class rates it now seeks to collect, complainant's use of Be-Mac's service would have ceased immediately.

Defendant maintains that the discounted rates initially assessed were not authorized by an applicable filed tariff in effect at the time of shipment, and that the undiscounted rates it here seeks to assess have not been shown to be unreasonable. Be-Mac further asserts that complainant has provided no evidence that the originally assessed charges were negotiated.

Be-Mac supports its arguments with a verified statement from Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc. (CSI), the auditor authorized by the court to provide rate audit and collection services on behalf of defendant. Mr. Swezey states that the originally assessed charges were based on Middlewest tariff ICC MFIC 457-E, a tariff providing reduced line haul rates that, per item 120, applied only to shipments originated on an MFIC freight bill. Because the shipments at issue were originated and billed by Be-Mac, Mr. Swezey argues that the rates assessed on the original freight bills were not applicable. He asserts that the originally assessed charges were rerated in the corrected freight bills using the applicable bureau class rates. Mr. Swezey maintains that the tariff rates set forth in the corrected freight bills are applicable and have not been shown to be unreasonable.

## DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.[5]

Section 13711(a) provides, in pertinent part, that "It shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to [the jurisdiction of the Board] . . . to attempt to charge or to charge for a transportation service the difference between (1) the applicable rate that was lawfully in effect pursuant to a [filed] tariff . . . and (2) the negotiated rate for such transportation service if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this section."

[5] Typically, a court hearing undercharge cases will direct the shipper to bring to the Board all defenses that have been raised in court; as a result, in addition to section 13711 issues, petitioners before the Board typically raise issues of contract carriage, rate applicability and rate reasonableness. When it is able to resolve a case fully on section 13711 grounds, however, the Board does not address those other more complex issues. See, e.g. Rhinelander Paper Company v. The Bankruptcy Estate of Murphy Motor Freight Lines, Inc., No. 40837 (STB served Oct. 23, 1997). We will not address the other issues raised here because our section 13711 findings fully resolve the question of complainant's liability for the rates sought.

It is undisputed that Be-Mac no longer transports property. Accordingly, we may proceed to determine whether Be-Mac's attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 13711(a) determination. Section 13711(f) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed and for which there is written evidence of such agreement." Thus, section 13711(a) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains copies of the rerated balance due freight bills issued on behalf of defendant that indicate initially assessed charges that are significantly less than the undiscounted class rates that defendant is here seeking to collect. In addition, the record contains a letter dated October 21, 1991, from Middlewest to Master Lock, referring to and identifying offered rates that conform with the rates originally assessed. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994).[6] See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp. C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (mem.) (finding that written evidence

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[6] Be-Mac, at p. 4 of its statement filed November 14, 1996, argues that freight bills cannot be used as the basis for satisfying the written evidence requirement. Defendant asserts that allowing freight bills to be used for this purpose would render the written evidence provision of section 13711(f) superfluous because the Board, under section 13711(b)(2)(D), must independently consider whether the carrier submitted and collected freight bills reflecting the unfiled agreed-upon rate.

The Interstate Commerce Commission (ICC) and the Board have consistently rejected this argument. Section 13711(b)(2)(D) requires the Board to consider "whether the [unfiled] rate was billed and collected by the carrier." There is no requirement under this provision that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in a pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 13711(f) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the "written evidence" requirement of section 13711(f). Defendant's argument might be more persuasive if the written evidence requirement were a "sixth" element of the merits determination under section 13711(b)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold requirement needed to invoke section 13711. See E.A. Miller, supra, at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 13711(b)(2) to determine whether the carrier's undercharge collection effort is an unreasonable practice.

need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

In this case the evidence indicates that the parties conducted business in accordance with agreed-to negotiated rates that were originally assessed by Be-Mac and paid by Master Lock. The originally assessed rates were the product of negotiations between Master Lock and Middlewest and the subject of tariff ICC MFIC 457-E, a discount tariff to which Be-Mac was a participant issued by Middlewest for the account Master Lock. The consistent application in the original freight bills of assessed charges based on the reduced line haul rates set forth in tariff ICC MFIC-457-E, a tariff published by a carrier acquired by Be-Mac to which defendant was also a participant, supports the assertions of Mr. Klefstad and reflects the existence of negotiated rates. The evidence further indicates that Master Lock relied on the negotiated rates in tendering its traffic to Be-Mac, and that Master Lock would not have used Be-Mac to transport the shipments at issue had defendant attempted to charge the rates it here seeks to assess.

In exercising our jurisdiction under section 13711(b), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 13711(b)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 13711(b)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 13711(b)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 13711(b)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 13711(b)(2)(E)].

Here, the evidence establishes that negotiated rates were offered to Master Lock by Be-Mac; that Master Lock reasonably relied on the offered rates in tendering its traffic to Be-Mac; that Be-Mac did not properly or timely file a tariff providing for such negotiated rates and has not entered into an agreement for contract carriage; that the negotiated rates were billed and collected by Be-Mac; and that Be-Mac now seeks to collect additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for Be-Mac to attempt to collect undercharges from Master Lock for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable David P. McDonald
United States Bankruptcy Court for
the Eastern District of Missouri, Eastern Division
211 North Broadway, 7th Floor
St. Louis, MO 63102

Re: Adv. No. 95-4509-293

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary